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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinios 60604

Submitted July 30, 1998

Decided July 30, 1998

Before

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

THIRL CHAVIS,

Petitioner-Appellant

No. 98-1237

v.

UNITED STATES OF AMERICA

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

IP 97-1613-C-M/F

Larry J. McKinney, *Judge.*

ORDER

Petitioner moved to vacate, correct, or set aside a

sentence pursuant to 28 U.S.C. 2255. This district court denied the motion and declined to issue a certificate of appealability. Petitioner now has filed an application for a certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1237

THIRL CHAVIS,)
Petitioner-Appellant)
)
v.)
)
UNITED STATES OF AMERICA)
Respondent-Appellee.)

Appeal from the United States District Court, Southern District of Indiana
Indianapolis Division
Cause No. IP97-1613-C-M/F
Hon. Larry J. McKinney, District Judge

APPELLANT'S RESPONSE TO APPELLEE'S JURISDICTIONAL MEMORANDUM

TO THE HONORABLE CIRCUIT JUDGES OF SAID COURT:

Pursuant to the Court's order dated June 23, 1998, and the Appellee's (herein also referred to as ''Government'') advise to the Court in its **''Jurisdictional Memorandum''** (''Memo'') dated June 26, 1998, Appellant respectfully sets forth the following:

COURT'S ORDER

Considering Appellant is peoceeding in Pro Se status and the fact Appellant is inartful in law, the Court's order dated June 23, 1998 is clear and certainly without ambiguity for the resaon that, the Court clearly sets forth:

1. That, Sections 105 and 106(b) of the Antiterrorism and Death Penalty Act (''ADEPA'') of 1996 prescribes requirements for **second or successive** collateral attacks on Judgments in criminal cases.

2. That, ''IT IS ORDERED that the appellee file, on or before June 29, 1998 a statement advising this court whether appellant brought a previous post-conviction motion under 28 U.S.C. section 2255 challenging the same judgment that appellant now challenges.''''If so, appellee shall provide the court with the district court docket number and a copy, if there is one of this court's order authorizing the filing of a second or successive petition or motion.''

The Court continues in its above stated order: ''If appellee takes the position that the current matter is successive, appellee shall file a copy of the district court order ruling on the earlier petition with its response.''

APPELLEE'S POSITION RELATIVE TO A SECOND OR SUCCESSIVE POST CONVICTION RELIEF MOTION

In conjunction with the above Court Order and the contents therein Appellee response is as follows:

1. ''It is not the position of the United States that the instant appeal is that of a second or successive post conviction relief motion.'' [Please see page one- ''Jurisdictional Memorandum''].

2. Appellee continues in part asserting that: ''In light of the unique procedural history of this case, however, the United States does not assert or claim that Chavis' petition is a second or successive motion.''

In light of the above, the government's position is clearly in all things demonstrated by its pleading that, Appellant's instant appeal does not fall within the rems of the ''AEDPA'' and in further consideration of the same, Appellant's ''COA'' should be granted pursuant to all issues presented and its appeal in the interest of justice should be heard.

Appellant further asserts that, all other matters brought forward by Appellee are in all things superflorous, frivulous and without meritrelative to the above stated Court order for the reason that, the Court did not order Appellee to raise any issues pertaining to time bar. Accordingly,

Appellee's argument relative to any issue outside the rem of the above stated Court order should not be considered in the interest of justice.

WHEREFORE ALL PREMISES considered Appellant prays onto the Court to grant his ''COA'' and further, consider his issues as pled in the record moreover, Appellant's offended rights under the Constitutional issues raised by Appellant in the case at bar. In the alternative, Appellant prays onto the Court of Appeals for Seventh Circuit to remand the case at bar for the purpose of expanding the record on the Constitutional violations plead by Appellant pursuant an evidentiary hearing.

Respectfully submitted,

/S/

THIRL CHAVIS,
Reg. No. 99019-012
FPC-Nellis CS 4500
N. Las Vegas,NV 89036

CERTIFICATE OF SERVICE

I hereby certify that Gerald A. Corz, Assistant U.S. Attorney was caused to be served at 46 E. Ohio St., Indianapolis, IN 46204 relative to the foregoing pleading hereto attached on this 8th day of July, 1998, by depositing the same in the U.S. Mail postage prepaid.

/S/

Thirl Chavis, Pro Se
Reg. No. 99019-012
FPC-Nellis, CS 4500
N.Las Vegas,NV 89036

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1237

THIRL CHAVIS,	)
Petitioner-Appellant	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Respondent-Appellee.	)

Appeal from the United States District Court, Southern District of Indiana
Indianapolis Division
Cause No. IP97-1613-C-M/F
Hon. Larry J. McKinney, District Judge

JURISDICTIONAL MEMORANDUM

For its response to the Court's order dated June 23, 1998, the United States of America advises the Court as follows:

It is not the position of the United States that the instant appeal is that of a second or successive post conviction relief motion.

This case has an unusual procedural history. On April 9, 1992, the Appellant Chavis was indicted in a four count indictment handed down by the Grand Jury

sitting in the Southern District of Indiana. That indictment charged Chavis with a variety of drug related charges relating to his possession of cocaine with intent to distribute (and conspiracy to distribute) that illegal substance. A superseding indictment with respect to these charges was handed down by the Grand Jury on March 24, 1993.

Chavis was convicted, after a jury trial, of all four counts of the superseding indictment. On July 21, 1993, the district court imposed a sentence of 150 months on each count, to be served concurrently, upon Chavis.

Chavis filed a timely notice of appeal of his conviction. Instead of pursuing that direct appeal, Chavis, by his counsel, moved on January 5, 1994, to voluntarily dismiss his direct appeal. The Seventh Circuit, by an order dated January 7, 1994 ordered Chavis' appeal [No. 93-2836] dismissed pursuant to Fed.R.App.P. 42(b) and Circuit Rule 51(d).

On February 22, 1994, Chavis filed a motion for post conmviction relief pursuant to 28 U.S.C. section 2255. That motion was then voluntarily dismissed without prejudice by Chavis in January of 1995.

On June 20, 1997, Chavis submitted a new Section 2255 motion to the district court.The district court (on June 30, 1997)

dismissed this petition as successive. Chavis appealed that dismissal and the Seventh Circuit, on

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1 The case name and Seventh Circuit cause number for Chavis' direct appeal was United states v. Thirl Chavis and Karen Moutry, Nos. 93-2836 and 93-2919.

2 This dismissal was pursuant to the district court's suggestion. See Chavis v. United States, Nos. 97-3118 and 97-9092, Order dated September 17, 1997.

September 17, 1997, reversed the district court's dismissal and remanded the case for further proceedings in the district court.

Pursuant to the order of remand, the district court (by order dated September 29, 1997) directed that Chavis' motion for post conviction relief be allowed to proceed and that it be docketed as a new civilaction. The new civil cause number assigned was IP97-1613, the United States moved to dismiss Chavis' section 2255 motion on the grounds that it was time barred and additionally barred by the procedural default.

On January 6, 1998, the district court entered its judgment dismissing

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3 The Seventh Circuit, in its order of September 17, 1997, noted that Chavis petition appeared to have other non-jurisdictional defects, including being

time barred, but left those issues to the district court to resolve on remand.

4 The case number in Chais' underlying criminal conviction was IP92-59-CR-01-M/F.

Chavis' motion filed pursuant to 28 U.S.C. section 2255 as time barred. The district court did not address the issue of Chavis' procedural default.

The United States believes that Chavis' claim is both time barred and barred by his procedural default. In light of the unique procedural history of this case, however, the United States does assert or claim that Chavis' petition is a second or successive motion.

A copy of the Seventh Circuit's order dated September 17, 1997 in Nos. 97-3118 and 97-9092 is attached as an exhibit hereto.

Respectfully submitted,

JUDITH A. STEWART
UNITED STATES ATTORNEY

By: /S/

Gerald A. Coraz
Assistant United States
Attorney

CERTIFICATE OF SERVICE

The is to certify that I have served a copy of the foregoing JURISDICTIONAL MEMORANDUM, upon the Respondent-Appellee herein, by mailing a copy thereof to the following on this 26th day of June, 1998.

Thirl Chavis
Reg. No. 99019-012
Nellis Federal Prison Camp
Nellis A.F.B.- Area 2
N. Las Vegas, NV 89036-4500

/S/
Gerald A. Coraz
Assistant United States Attorney

Office of the United States Attorney
5th Floor, United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204
Telephone: 317- 226-6333

United States Court of Appeals
For The Seventh Circuit
Chicago, Illinois 60604

Submitted July 30, 1998

Decided July 30, 1998

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

THIRL CHAVIS,
Petitioner-Appellant,

No. 98-1237 v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States
District Court for the Southern
District of Indiana,
Indianapolis Division.

IP 97-1613-C-M/F

Larry J. McKinney,
Judge.

ORDER

Petitioner moved to vacate, correct or set aside a sentence pursuant to 28 U.S.C. section 2255. The district court denied the

motion and declined to issue a certificate of appealability. Petitioner now has filed an application for a certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. section 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

United States Court of Appeals

for the Seventh Circuit

Chicago, Illinois 60604

Decided September 17, 1997

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

THIRL CHAVIS,

Petitioner-Appellant,

Nos. 97-3118 & 97-9092 *v.*

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. IP 94-398-C

Larry J. McKinney, *Judge.*

ORDER

Thirl Chavis filed his initial motion under 2255 in February 1994. By order of October 11, 1994, the district court also said that if the schedule was "unmanageable" for

Chavis, "the defendant should consider seeking the dismissal of this action without prejudice...[and] thereafter seek to reinstate it or commence a new action when an investigation satisfactory to him has been completed." In response to that order, Chavis sought and in January 1995 was granted permission to dismiss his case without prejudice.

On June 20, 1997, accepting the district court's invitation, Chavis filed a motion requesting permission to "refile" his 2255 motion. Ten days later, the district court denied the motion on the ground that it was successive and therefore the district court lacked jurisdiction over the matter under our decision in *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996). Chavis responded in two ways: first, he filed an application with this court for permission to file a successive petition, which is before us in No. 97-9092 (after an initial false start), and second, he filed a notice of appeal from the district court's order dismissing his motion, which is before us in No. 97-3118.

We have concluded that, under these circumstances, Chavis qualifies for the exception we recognized in *Felder v. McVicar*, 113 F.3d 696 (7th Cir. 1997), for petitioners who "dismissed the first petition in reliance on the law that existed befire the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and that was more liberal with regard to the filing of successive petitions for habeas corpus." *Id.* at 698 (citing *Burris v. Parke*, 95 F.3d 465 (7th Cir. 1996) (en banc).) Chavis not only moved for dismissal long before the AEDPA appeared, but he did so at the express invitation of the district court, with the assurance that a renewed filing would be accepted (and thus would not be barred under Rule 9(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts). If he had known that the price of accepting the district court's invitation to take a voluntary dismissal would be a later bar against refiling the motion, it is unlikely he would have done so. It is equally unlikely that the district court would have suggested such an option. Instead, Chavis probably would

have sought, and the district court would probably have granted, additional time for him to substantiate his claims.

We therefore deny Chavis' application in No. 97-9092 as unnecessary, reverse the district court's order finding no jurisdiction in No. 97-3118, and remand for further proceedings in that court on the motion. In that connection, we note that Chavis may have other, non-jurisdictional, problems with his 1997 motion, as it appears to have been filed beyond the one-year period provided by 2255, 6. See *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 117 S. Ct. 2059 (1997). We leave consideration of the statute of limitations question to the district court on remand.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

THIRL CHAVIS,

Petitioner-Appellant

v. USCA NO. 98-1237

UNITED STATES OF AMERICA, USDC NO. 97-C-1613

Respondent-Appellee.

APPELLANT'S DOCKETING STATEMENT

IN ACCORDANCE TO CIRCUIT RULE 3 (c) AND

IN FURTHERANCE OF CIRCUIT RULE 28 (a)

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW Thirl Chavis Petitioner/Appellant ("Appellant") in the above-entitled and numbered cause of action who is proceeding in Pro Se status and moves the Court pursuant to 28 U.S.C. 2255 et seq.; 2255 and, for good cause would respectfully show the Court:

I.

JURISDICTIONAL STATEMENT

This court has jurisdiction over the instant cause of action pursuant to 28 U.S.C. 1291; 2253 and Fed.R.App.P. Rule 22(b). Since Appellant filed **both** a notice of appeal and a request for the issuance of a certificate of appealablility in the district court pursuant to the district court's dismissal of Appellant's 2255 on January 6, 1998, and the fact that it is well settled relative to the well established power of the Court of Appeal in granting expressed authority to district courts as compelling for district courts to retain the authority to issue certificates of appealability ("COAs") for 2255 petitions under the "AEDPA" **Else v. Johnson,** 104 F.3d at 83 (5th Cir. 1997), Appellant filed his request for the issuance of a COA in the distritct court along with his notice of appeal on January 20, 1998. On January 23, 1998 the district court entered its final order denying Appellant's request for a COA without referencing the record. Appellant's filing of his notice of

constituted a request to have all raised in his petition pursuant to C. section 2255 to be reviewed by ge of the Court of Appeals. of App.P.Rule 22(b): In re Certificate ability, 106 F.3d 1306 at 1307 (6th 997).

II.

PROCEDURAL FACTS

In furtherance fo Circuit Rule 2), the date of the judgment sought pellant to be reviewed by the Court district court's final Orders and nts entered on January 6, 1998 and y 23, 1998 respectfully.

III.

CERTIFICATE OF INTEREST

lease see Excerpt No. ''A'' hereto ed for al pertinent purposes.

IV.

STATEMENT OF THE CASE

Further, in accordance to Circuit 28(c) Appellant sets forth the ing:

(i) **COURSE OF PROCEEDINGS AND DISPOSTION IN THE DISTRICT COURT.**

On April 9, 1992, and Indictment was returned and filed in the United States District Court, For The Southern District of Indiana, Indianapolis Division. The Indictment consisted of Three (3) Counts. Count One: Violation of 21 U.S.C. 841 (a)(1) and 846, Conspiracy to possess with intent to distribute and to distribute cocaine, a Schedule II Narcotic Controlled Substance, in a quantity of five hundred (500) grams or more.; Count Two: Violation of 21 U.S.C. 841 (a)(1), Possession with intent to distribute approximately twenty two (22) ounces of cocaine, a Schedule II Narcotic Controlled Substance.; Count Three: Violation of 21 U.S.C. 841 (a)(1), Possession with intent to distribute approximately twenty two (22) ounces of cocaine, a Schedule II Narcotic Controlled Substance.

On March 24, 1993, a Superseding Indictment was filed in the same district court as that one Indictment filed on

Pursuant to a trial by jury, Appellant Chavis was found guilty on all four (4) Counts set forth in the Superseding Indictment and was sentenced on July 21, 1993 on the various four (4) counts relating to cocaine. The district court sentenced Appellant to an imprisoned term of 150 months on each Count 1, 2, 3, and 4 all to be served concurrent.

Appellant filed his notice of appeal timely but, pursuant to his counsel's advice, Appellant's counsel filed a Motion to Dismiss Appeal on or about December 31, 1993.

Subsequently, on or about February 22, 1994, Appellant Chavis filed his initial papers and documents relative to 28 U.S.C. 2255. Moreover, Appellant's counsel filed a motion to dismiss Appellant's 2255 upon the district court's recommendation for Appellant to complete his investigation in conjuction to his 2255 discovery investigation. The 2255 was dismissed without prejudice and the district court's recommendation to refile. The

government went along with the dismissal and the understanding that Appellant would refile upon his completion of his investigation into matters relative to his 2255.

As the record demonstrates, when Appellant attempted to refile his previously dismissed cause of action, the district court dismissed Appellant and Appellant filed his notice of appeal. The United States Court of Appeals For The Seventh Circuit reversed and remanded the case to the district court. Appellant filed his 28 U.S.C. 2255 in the district court and on January 6, 1998, the district court dismissed Appellant's 2255 citing that Appellant was timely barred pursuant to the one year time to file. Appellant filed his notice of appeal timely along with his request for a COA, the district court denied the Appellant's request for a COA. The instant appeal follows.

In view and consideration of the above that, a district court must deny the COA before a Petitioner can request one from the Court of Appeals **Rule 22(b)** and the fact Appellant

was denied, Appellant presents the instant pleading for the Court of Appeal's review and consideration. In furtherance of the instant pleading, Appellant incorporates herein by reference his "Request for Certificate of Appealability" and Bried in Support thereto and in so doing, Appellant prays onto the Court for the Court to enter its Order in conjunction to the filing of Appellant's COA and Brief in Support thereto. Appellant further prays onto the Court for adequate time to prepare his COA and Brief in Support thereto.

WHEREFORE ALL PREMISES considered, Appellant prays onto the Court to GRANT him permission to file his Request for Certificate of Appealability and Brief in Support thereto.

Respectfully submitted,

/s/

THIRL CHAVIS, PETITIONER,
Pro Se Reg.No.99019-012
FPC - Nellis CS 4500
N.Las Vegas,NV 89036

CERTIFICATE OF INTEREST

Appellate Court No. 98-1237

Short Caption: THIRL CHAVIS V. UNITED STATES OF AMERICA

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

(1) The full name of every party or amicus the attorney represents in the case:

THIRL CHAVIS, PRO SE

(2) If such party or amicus is a corporation:

i) Its parent corporation, if any; and

N/A

ii) A list of stockholder which are publicly held

companies owning 10% or more of the stock in the party or amicus:

N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

N/A

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from of the table of contents to the party's main belief.

Attorney's Signature: APPELLANT CHAVIS IS PROCEEDING PRO SE

Date: MARCH 2, 1998

Attorney's Printed Name: THIRL CHAVIS, PRO SE

Address: FPC - NELLIS, CS 4500 N. LAS VEGAS

NV 89036-4500
Phone Number: Prison Camp Phone Number

Unkown to this Appellant.

CERTIFICATE OF SERVICE

I hereby certify that, U.S. Attorney For Southern District of Indiana was caused to be served at 46 E. Ohio St. Indianapolis, IN 46204 relative to the foregoing pleading hereto attached on this 2nd day of March, 1998, by depositing the same in the U.S. Mail postage prepaid.

/s/

Thirl Chavis, Pro Se

Reg. No. 99019-012

FPC-Nellis, CS 4500

North Las Vegas, NV

89036-4500

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 23, 1998

By the Court

THIRL CHAVIS Petitioner- Appellant,	)Appeal from the United)District Court for the)Southern District of)Indiana, Indianapolis
No.98-1237 v.	)Division.
UNITED STATES OF AMERICA Respondent- Appellee	)No. 97-C-1613

Larry J. McKinney, Judge

ORDER

Sections 105 and 106(b) of the Antiterrorism and Effective Death Penalty Act of 1996 prescribe requirements for second or successive collateral attacks on judgments in criminal cases. Among other things, the new law requires approval from the court of appeals before a second or successive petition may be filed in the District Court. The present case presents for our review the denial of a post-conviction motion under 28 U.S.C. section 2255.

Accordingly,

IT IS ORDERED that the appellee file, on or before June 29, 1998 a statement advising this court whether the appellant brought a previous post-conviction motion under 28 U.S.C. section 2255 challenging

challenges. If so, appellee shall provide the court with the district court docket number and a copy, if there is one, of the court's order authorizing the filing of a second or successive petition or motion.

If appellee takes the position that the current matter is successive, appellee shall file a copy of the district court order ruling on the either petition with its response.

NOTE: Caption document ''JURISDICTIONAL MEMORANDUM.'' The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.

UNITED STATES DISTRICT COURT
Southern District of Indiana

Office of the Clerk

105 U.S. Courthouse GERALDINE T. CROCKETT

46 East Ohio Street CLERK

Indianapolis, IN 46204 317-226-6670

January 23, 1998

CAUSE NO:IP97-1613-C-M/F

JUDGE: Larry J. McKinney

Dear Appellant:

You filed a Notice of Appeal in the above case on 01-20-98.

The docketing statement required by Circuit Rule 3(c), which is attatched, of the U.S. Court of Appeals for the Seventh Circuit was not filed with the Notice of Appeal.

This is to notify you that pursuant to Circuit Rule 3(c), the appellant must serve on all parties docketing statement and file said statement with the Clerk of the Court of Appeals for the Seventh Circuit within seven (7) days of

the filing of the Notice of Appeal.

Do not attempt to file the docketing statement with this office after you have filed you Notice of Appeal. Docketing statements will only be accepted in the District Court when tendered with a Notice of Appeal. Docketing statements should be sent to the following address:

MR. THOMAS F. STRUBBE, CLERK

UNITED STATES COURT OF APPEALS

219 SOUTH DEARBORN STREET

CHICAGO, ILL 60604

GERALDINE T. CROCKETT

CLERK

BY: Greg Nahmens

(317) 226-5994

___ RECIEVED FOR APPELLANT

___MAILED TO APPELLANT

CIRCUIT RULE 3 Notice of appeal, docketing fee and docketing statement.

(a) Forwarding Copy of Notice of Appeal. When a notice of appeal to this court id filed with the clerk of the district court, the clerk shall promptly mail to the clerk of this court a copy of the notice of appeal together with a copy of the docketing statement. In civil cases. the Clerk of the district court shall include the judgments or orders under review, any transcribed oral statement of reasons, opinions, memorandum of decision, findings of fact and conclusions of law. The clerk of the district court shall also complete and include the Seventh Circuit Appeal Information Sheet in the form prescribed by this court.

(b) Dismissal of appeal for failure to pay docketing fee. If a proceeding is docketing without prepayment of the docketing fee, the appellant shall pay the fee within 14 days after docketing. If the appellant fails to do so, the clerk is authorized to dismiss the appeal.

(c)(1) Docketing statement. The appellant must serve on all parties a docketing statement file it with the clerk of the district court at the time of the filing of the notice of appeal or with the clerk of this court within seven days of filing the notice of appeal. The docketing statement must comply with the requirements of Circuit Rule 28(b). If there have been prior or related appellate proceedings in the case, or if the party believes that the earlier appellate proceedings are sufficiently

must identify these proceedings by caption and number. If any of the parties to the litigation appears in an official capacity, the statement must identify the current occupant of the office. The docketing statement in a collateral attack on a criminal conviction must identify the prisoner's current place of confinement and its current warden; if the prisoner has been released, the statement must decribe the nature of any ongoing custody (such as supervised release) and identify the custodian. If the docketing statement is not complete and correct, the appellee must provide a complete one to the court of appeals clerk within 14 days after the date of the filing of the appellant's docketing statement.

(2) Failure to file the docketing statement within 14 days of the filing of the notice of appeal will lead to the imposition of a $100 fine on counsel. Failure to file the statement within 28 days of the filing of the notice of appeal will be treated as abandonment of the appeal and the appeal will be dismissed. When the appeal is docketed the court will remind the litigants of these provisions.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
VS.)
)
Cause No. IP-92-59-CR-01-M/S
IP97-1613-C-M/F
THIRL CHAVIS,)
Defendant.)

ENTRY

The material filed by the defendant on January 20, 1998, shall be construed as both a notice of appeal and a request for the issuance of a certificate of appealability.

A certificate of appealability is a jurisdictional prerequisite to an unsuccessful habeas applicant appealing the denial of relief sought pursuant to 28 U.S.C. section 2255. 28 U.S.C. section 2253(c)(1)(B). "A certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. section 2253(c)(2). For the reasons stated in connection with the denial of Mr. Chavis' motion for relief pursuant to 28 U.S.C. section 2255, the court does not find that he will be able to make "a substantial showing of the denial of a constitutional right." Accordingly, the defendant's request for the issuance of a certificate of appealability is denied.

The defendant is directed to pay the appellate fees of $105.00 within twenty (20) days.

IT IS SO ORDERED.

/S/
Larry J. McKinney,
Judge
United States Court

Copies to:

Melanie C. Conour
Office of the United States Attorney
United States Courthouse-5th Floor
46 East Ohio Street
Indianapolis, IN 46204

Thirl Chavis
Reg No. 99019-012
FPC - Nellis
CS 4500
N.Las Vegas, NV 89036-4500

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
Respondent,)
)
v.)
)
THIRL CHAVIS,)
Petitioner.)

Crim. No. IP-92-59-CR-01-M/S
Civ. Action No. IP-97-1613-C-M/F

APPLICATION/MOTION FOR CERTIFICATE OF APPEALABILITY AND/OR IN THE ALTERNATIVE "NOTICE OF APPEAL"

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Thirl Chavis Petitioner/Defendant ("Petitioner") in the above-entitled and numbered cause of action who is proceeding in Pro Se status and request the Court to hold the instant pleading to less stringent standards than those drafted by attorneys as stated in Haines v. Kerner, 404 U.S. 519; Cruz v. Beto, 405 U.S. 319.

In the aforementioned, Petitioner sets forth what has been determined in this country throughout the circuits relative to Certificates of Appealability ("COA").

In ccnsideration of a COA, it is well settled that district courts have power to issue certificates of appealability of denial of habeas corpus, 28 U.S.C.

section 2253 (C)(1); Fed. R. App.P. Rule 22(b); Muniz v. Johnson, 114 F.3d at 44 (5th Cir. 1997).

In further consideration of the well established power of the Court of Appeals, it granted expressed authority to district courts as compelling for district courts to retain the authority to issue certificates of appealability for section 2255 petitions under the "AEDPA" Else v. Johnson, 104 F.3d at 83 (5th Cir. 1997), the holding further addressed the standards of review contained in section 104 of the "AEDPA" which apply to pending habeas corpus petitions. See Drinkard, 97 F.3d at 764-66 (5th Cir. 1996).

In view, consideration and furtherance of the above mentioned expressed authority to district courts to issue COAs for section 2255 petitions under "AEDPA" Johnson, supra and also the holding in turning to the text of Fed.R.App.P. Rule 22(b), as amended by section 103 of the "AEDPA", it was restated that Rule 22(b) states:

"If an appeal is taken by the appellant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such certificate should not issue. The certificate or the statement shall be forwarded to the Court of Appeals with the notice of appeal and the file of the proceedings in the district court. If the district court judge denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge...."

It was also stated in part that, a district court must deny the COA before a petitioner can request one from the Court of Appeals. It was pursuant to the fact that, the rule contemplates that the district court will make the first judgment whether a COA should issue and on which issues, and that the circuit Court will be informed by the district court's determination in its own decisionmaking. **Muniz v. Johnson**, 114 F.3d at 45 (5th Cir. 1997)(citing **Cf.Lyons,** 105 F.3d at 1076 n. 18).

In view and in consideration of the above that the district court must deny the COA before Petitioner can request one from the Court of Appeals and the fact Petitioner's section 2255 was denied, Petitioner presents the instant pleading for the Court's review and consideration, moreover, on the facts and circumstances which led to the Court's conclusion. In the Court's analogy of section 105 provisions curiously enough, the Court in its "Entry Dismissing Motion For Relief and Directing Entry of Judgment" sets forth two exceptions that are clearly on target relative to Petitioner and the fact that, he is not time barred.

(1) The government's concealment of crucial evidence caused an impediment for Petitioner to making a colorable motion pursuant to section 2255. It was clearly demonstrated by the Court's dismissal without prejudice and suggestion to Petitioner to refile his documents and papers upon his completion of his investigation of the crucial evidence that tend to indicate the government's impediment through its concealment of

demonstrate Petitioner's innocense all of which the Court failed to reference in its above stated ''Entry Dismissing Motion For Relief and Directing Entry of Judgment.''

(2) Had the Court referenced the record in the case at bar, it would have found that, it was pursuant to Petitioner's due diligence that the case at bar was filed on June 13, 1997, all of which was pursuant to the Court's suggestion to Petitioner to file after his investigation was completed. For the two (2) facts listed herein above, Petitioner is clearly not time-barred moreover, the Court tends to indicate that its conclusion to dismiss Petitioner was in part in consideration of the Government's Motion To Dismiss, the same motion that Petitioner clearly demonstrated to the Court was improperly filed before the Court.

In furtherance of the instant pleading, Petitioner clearly styled the instant pleading in the alternative as **''Notice of Appeal''**. Moreover, Petitioner's filing of the instant **''Notice of Appeal''** constitutes a request to have all the issues raised in his petition pursuant to 28 U.S.C. section 2255 to be reviewed by a jusge of the Court of Appeals. **Fed.R.App.P.Rule 22(b); In re Certificates of Appealability,** 106 F.3d 1306 at 1307 (6th Cir. 1997). For the two exceptions above listed, the Court should find Petitioner is not time-barred therefore, the Court in the interest of justice should grant Petitioner this his application for Certificate of Appealability and, in the

Petitioner's Application for Certificate of Appealability then, Petitioner request that the instant pleading be considered as his **"Notice of Appeal"** on the Court's final Order and judgment denying Petitioner's 28 U.S.C. section 2255.

WHEREFORE ALL PREMISES considered, Petitioner prays onto the Court to GRANT this his **"Application/Motion For Certificate of Appealability"** for the reasons stated herein and in the interest of justice.

Respectfully submitted,

/S/

THIRL CHAVIS, PETITIONER
Reg.No. 99019-012
FPC- Nellis cs 4500
N.Las Vegas, NV 89036

10e

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been caused to be served upon the United States Attorney for the Southern District of Indiana on the 16th day of January, 1998, by depositing the same in the United States Mail postage prepaid.

/s/

Thirl Chavis, Pro Se

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA

vs. Cause No. IP 92-59-CR-01-M/S
IP97-1613-C-M/F

THIRL CHAVIS,

Defendant.

JUDGMENT

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the defendant take nothing by his motion for relief pursuant to 28 U.S.C. 2255 and this action is **dismissed without prejudice.**

/s/

LARRY J. MCKINNEY,
JUDGE

United States District Court

Date: 1/6/98
Copies to:

Melanie C. Conour
Office of the United States Attorney
United States Courthouse - 5th Floor
46 East Ohio Street
Indianapolis, IN 46204

Thirl Chavis
Reg. No. 99019-012
FPC - Nellis
CS 4500
North Las Vegas, NV 89036-4500

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISON

UNITED STATES OF AMERICA,

vs. Cause No. IP 92-59-CR-01-M/S

IP97-1613-C-M/F

THIRL CHAVIS,

Defendant.

ENTRY DISMISSING MOTION FOR RELIEF

AND DIRECTING ENTRY OF JUDGMENT

Defendant Chavis is serving the executre portion of a sentence imposed in this court on July 31, 1993, following his conviction of drug offenses after a trial by jury. Chavis filed an appeal, which was dismissed at Chavis' request on January 7, 1994. Chavis filed his first motion for relief pursuant to U.S.C. 2255 on February 22,1994, which was later dismissed without prejudice. Chavis filed this second motion for relief pursuant to 2255 on September 29, 1997. The United States seeks the dismissal of this action as time-barred, and Chavis has replied.

Whereupon the court, having considered Chavis' second motion for relief, the United States' motion to dismiss and Chavis' reply, and being duly advised, now finds that the motion to dismiss must be granted. This conclusion is compelled by the following facts and circumstances:

1. Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides, in part, as follows:

> A 1-year period of limitations shall apply to a motion under this section [28 U.S.C. 2255]. The limitations period shall run from the latest of--
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially

recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligance.

Pub.L. No. 104-132, 105, 110 Stat. 1214, 1220 (codified at 28 U.S.C. 2255). The statute thus provides a one year limitation period in which claims under 2255 must be brought.

2. The pertinent times in the present action are not in dispute.

a. Chavis' direct appeal was dismissed on January 7, 1994.

b. Chavis' first 2255 action was dismissed without prejudice in January, 1995.

c. Chavis filed a request for permission to relief his 2255 motion was initially rejected

by this court as a successive motion of that nature, for which the necessary statutory precursors had not been followed, but this decision was vacated by an Order of the Court of Appeals issued on September 17, 1997, in No. 97-3118 and No. 97-9097.

3. According Chavis the benefit of the doubt in the materials which he has submitted, the earliest date his present claims could be construed as having been asserted was on June 13, 1997. See *United States v. Ortiz*, 1997 WL 214934 (E.D.Pa. April 28, 1997) ("mailbox rule" applied to 2255 motion subject to AEDPA).

4. The 1-year period of limitations in this case ran from the dismissal of Chavis' appeal on January 7, 1994. However, since the 1-year period of limitations in the AEDPA is a new provision, Chavis had one year from the effective date of the AEDPA in which to bring his action. *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (AEDPA's time limit is "short enough that the 'reasonable

time' after April 24, 1996, and the one-year statutory period coalesce"), *rev'd on other grounds, Lindh v. Murphy,* 521 U.S. ___, 117 S. Ct. 2059 (1997). The 1-year anniversary of the AEDPA was April 24, 1997. Chavis' present action was not filed prior to that date, and hence Chavis' action was not timely brought and the merits of his motion cannot be reached. Chavis opposes this resolution of his motion only by averring that his claims are in fact meritorious and that the United States' motion to dismiss does not deserve to be granted. The first circumstance is irrelevant in light of the legislative determination that claims must be timely brought; and the second circumstance is only an expression of the defendant's state of denial that the statute of limitations argument by the United States is persuasive.

Based on the foregoing, the defendant's motion for relief pursuant to 28 U.S.C. 2255 is **denied.** This action is dismissed with prejudice and judgment consistent with this Entry shall now issure.

IT IS SO ORDERED

12e /s/

LARRY J. MCKINNEY,
Judge

United States District Court

Date: 1/6/98

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

RULE TO SHOW CAUSE

CIRCUIT RULE 3(c) DOCKETING STATEMENT

Date: February 19, 1998

By the Court:

No. 98-1237

THIRL CHAVIS,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

TO: Thirl Chavis

NELLIS FEDERAL PRISON CAMP

Reg. No. 99019-012

Nellis A.F.B. - Area 2

North Las Vegas, NV 89036-4500

Appeal from the United States District
for the

Southern District of Indiana, Indianapolis Division

No. 97 C 1613, Larry J. McKinney, Judge

Circuit Rule 3(c) directs the appellant to file and serve a Docketing Statement, which meets the requirements of Circuit Rule 28(a), with the clerk of the District Court at the time of the filinf of the notice of appeal or with the clerk of this court within seven days of filing the notice of appeal.

Your Rule 3(c) Docketing Statement has not been filed to date. Accordingly,

IT IS ORDERED that the appellant file this overdue Docketing Statement with the clerk of this court within fourteen (14) days of the date of this order. Failure to do so will result in a one hundred dollar ($100.00) fine and/or dismissal od this appeal.

NOTE: Please caption document "CIRCUIT RULE 3(c) DOCKETING STATEMENT". The filing of a "Jurisdictional Memorandum" which may have been specifically ordered by the court does not satisfy your obligation under Circuit Rule 3(c).

cc: Judith A. Stewart [13b]

(1023-053195)

14 & 15

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,)
Respondent-Appellee)
)
vs.)
USCA NO. 97-9084
USDC NO. IP-94-398-C-M/F
92-59-CR-01
)
THIRL CHAVIS,)
Petitioner-Appellant.)

RENEWAL
APPLICATION AND/OR REQUEST UNDER 28 U.S.C SECTION 2244(b) FOR LEAVE TO FILE A SECOND OR SUCCESSIVE PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Thirl Chavis Petitioner-Appellant (''Petitioner'') in the above-entitled and numbered cause of action who is proceeding in Pro Se status and who is also, pursuant to the Court's Order dated July 24, 1997, files the instant renewal pleading in conformance to the Court's Circuit Rule 22.2 and for good cause would respectfully show the Court:

I.
CONSIDERATION IN SUPPORT OF APPLICATION/ REQUEST
(Restatement)

For Court to hold Petitioner's pleadings in accordance to Haines v. Kerner, 404 U.S. 519; Cruz v. Beto, 405 U.S. 319.

II.
STATEMENT OF THE CASE
(Restatement)

(i) COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT.

On April 9, 1992, an Indictment was returned and filed in the United States District Court, for the Southern District of Indiana, Indianapolis Division. The Indictment consisted of three (3) Counts. Count One: Violation of 21 U.S.C. sections 841(a)(1) and 846, Conspiracy to possess with intent to distribute and to distribute cocaine, a Schedule II Narcotic Controlled Substance, in a quantity of five hundred (500) grams or more; Count Two: Violation of 21 U.S.C. Section 841 (a)(1), Possession with intent to distribute approximately twenty two (22) ounces of cocaine, a Schedule II Narcotic Controlled Substance; Count Three: Violation of 21 U.S.C. Section 841 (a)(1) Possession with the intent to distribute approximately twenty two (22) ounces of cocaine, a Schedule II Narcotic Controlled Substance.

On March 24, 1993, a Superseding Indictment was filed in the same Court as that one Indictment filed on April 9, 1992.

Pursuant to a trial by jury, Petitioner Chavis was found guilty of all four (4) Counts as set forth in the Superseding Indictment and was sentenced on July 21, 1993 on the various four (4) Counts relating to cocaine. The Court sentenced Petitioner to a imprisoned term of 150 months on each Count 1, 2, 3, and 4 all to be served concurrent.

Petitioner filed his notice of appeal timely but, pursuant to his counsel's advise, Petitioner's counsel filed a Motion To Dismiss Appeal on or about December 31, 1993.

Subsequently, on or about February 22, 1994, Petitioner filed his initial petition pursuant to 28 U.S.C. section 2255, and subsequently Petitioner's counsel filed a motion to dismiss Petitioner's section 2255 without prejudice.

Pursuant to Petitioner's motion to dismiss his section 2255 and the reasons set forth in said motion, Petitioner filed his "Defendant's Motion Requesting Permission To Refile His Motion Under 28 U.S.C. section 2255 To Vacate, Set Aside, or Correct Sentence By a Person In

go over to state court

Q. But many times because of some odd laws, you have a lot more leeway in sentencing people over there; isn't that right?

A. When this charge was filed, and based on the amount of product I got that day, taking it to state court was alot more severe than taking it to the federal.

Q. The severity of what Kay Siakotos was charged with was short of murder in a state court? The most serios offense you can be charged with is a Class A Felony.

A. I don't know that sir. I am not that familiar with those laws now. 15 years ago I would have been able to tell you that.

Q. You understand that an A felony which you charged her with carried 20 to 50 years?

A. Yes, sir.

Q. And you charged her with two of those?

A. Yes, sir.

Q. So she was facing a possible hundred year sentence?

A. No, sir. Based on my expierence, I have never seen anybody, never seen a judge stack time on somebody with Class A felonies.

Now, if we are going to be realistic about it, if she would have pled guilty or gone to trial, the maximum amount of time she would have got was 20 years.

Q. So in your idea if she would have gone to trial at all, she would have got was 20 Years?

A. Yes.

Q. You don't have that sort of leeway over here: the judges have very little leeway in the way of sentencing; isn't that correct?

A. Based on the amount of dope that I was able to get off of Kay Siakotos, if she would have come over here and I would have charged her over here, she had a chance of walking out of here with probation. In federa court. Without even cooperating. Because of the guide lines.

Q. Isn't it true that with a 20 year sentence where she was obviously dealing, you allow her to plead guilty to not dealing but possession; isn't that correct?

A. She was charged with possession also, yes.

Q. So we plead her to possession, she gets six years, which you have been around long enough to know that the state system, unlike the federal syaytem, you do one-half of your time?

A. Well, that is not correct.

Q. You get two days credit for every day you serve?

A. That is not correct. On a six year sentence, yes.

Q. You serve three years.

A. Only if you are good.

Q. If you are good you serve three years; is that correct?

A. Exactly. You must be good to get those three years.

Q. And taking it the long way around the barn and say that neither Phil Fogel nor Kay Siakotos today were in prison, they are in alternative placements of the system?

QUESTIONS BY MR. TEKOLSTE:

Q. Just a few matters for clarification.

I believe you stated that you knew that Kay Siakotos got the cocaine that was delivered to Jesse Abner on June 26th 1989 from Thirl Chavis. In fact, you don't know that, do you?

A. Just what Jesse and Kay told me. I did not see Mr. Chavis hand Kay Siakotos that.

Q. You didn't see that? You have been told numerous things about that; is that correct?

A. I have been told by Jesse Abner and Kay Siakotos, yes, sir.

Q. And Kay Siakotos apparently told Jesse Abner something else?

A. No, that is not correct.

Q. That is what Jesse Abner had to say?

A. That is the way he remembers it.

Q. Isn't it true that the standard for arrest is a little different than the standard for conviction? The legal standard?

A. Yes, sir.

Q. The standard for arrest is probable cause?

A. Probable cause, yes, sir.

Q. The standard for conviction is beyond a reasonable doubt?

A. Yes, sir.

Q. You also said that Kay Siakotos had nothing to gain by testifying. That is not true, is it?

A. Yes, sir, it is true.

Q. She had a plea agreement entered that as a condition of that

plea agreement required her to testify in federal court if necessary?

A. If necessary.

Q. And it became necessary, did it not?

A. Yes, sir, it did.

Q. And in fact that plea agreement, if she refused to testify, would have been null and void?

A. It could have been, yes, sir.

Q. So she did have something to gain?

A. No, sir. her deal was already cut.

Q. Well, either--

A. If this did not--

Q. Well, either a deal can be undone ot it can't be undone. I thought you just said it could be undone?

A. It could be undone, yes, sir.

MR. TELOLSTE: That is all I have, your honor.

THE COURT: Mr. Bookwalter.

QUESTIONS BY MR. BOOKWALTER:

Q. Special Agent Casey, Kay Siakotos isn't at the Women's Prison, is she?

A. No, sir, she is not.

Q. How old is she?

A. 33

Q. She is out on Girls School Road at the Indiana Girls School?
A. She is at the Indiana Girls School.

A. It means you are put back in jail upon a hearing to find out if you in fact violated your probation. I was violated because I got the cocaine charge.

Q. Are you familiar with Special Agent Tom Casey?

A. Yes, I am

Q. Was he responsible in part for the investigation resulting in your cocaine conviction?

A. Yes, he was.

Q. Are you also serving a forgery sentence now?

A. Right now the executed time I am serving is the cocaine case. The last eight months of my sentence is the remainder of my violation time.

Q. Is that because one sentence follows the other?

A. Because they are consecutive.

Q. As a result of your arrest for the cocaine case. did you enter into a plea agreement with the state of Indiana?

A. Yes, I did.

Q. Let me hand you what has been marked for identification purposes as Government

Exhibit Number 16, and ask you to take a look at that particular document and tell us whether or not it bears your signature.

A. Yes, it does.

Q. What is that document?

A. That was the plea agreement I signed in reference to my possession of cocaine case.

Q. And does it require you to cooperate with law enforcement officers?
A. It says I will testify truthfully in a federal case.
Q. Is that why you are here?
A. That is why I am here.
Q. What happens if you do not live up to that particular agreement in front of you?
A. The state can technically revoke my plea bargain, sentence me to more time.
Q. And what happens if you fail to testify truthfully?
A. I believe the same: they can revoke it.
Q. Are you also subject to charge of perjury?
A. Yes.

MS. CONOUR: The government moves to admit Government Exhibit Number 16.

MR. TEKOLSTE: No objection

MR. BOOKWALTER: No objection.

THE COURT: The exhibit is admitted.

(Government Exhibit 16 admitted in evidence)